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No. 267

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

JOHN CALCATERRA,

Appellant,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Appellee.

On Appeal from the Supreme Court of Illinois

JURISDICTIONAL STATEMENT

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INDEX

	PAGE
Opinion of the Court Below	2
Jurisdiction	2
Question Presented	3
Statute Involved	3
Statement of the Case	3
The Question is Substantial	6
Appendix A—	
Opinion of the Supreme Court of Illinois	App. 1-7

CITATIONS OF AUTHORITIES

Cases

Adkins v. Children's Hospital, 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785	2, 6
Coppage v. Kansas, 236 U.S. 1, 35 S.Ct. 240, 59 L.Ed 441	2, 6, 7
Ferguson v. Skrupa, 372 U.S. 726, 83 S.Ct. 1028, 10 L. Ed. 2d, 93	6
Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678 ..... L.Ed. 2d	6, 8
Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 44 S. Ct. 412, 68 L.Ed. 813	2, 6, 8
Lochner v. New York, 198 U.S. 45, 25 S.Ct. 539 9 L. Ed. 937	2, 6, 6-7

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On Appeal from the Supreme Court of Illinois

JURISDICTIONAL STATEMENT

The Appellant, John Calcaterra, appeals from the judgment of the Supreme Court of Illinois entered on November 19, 1965, affirming a judgment of conviction of the crime of selling a non-narcotic substance under the representation that it was a narcotic of the Circuit Court of Williamson County, Illinois, and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below

The opinion of the Supreme Court of Illinois is reported in 33 Ill. 2d 541, 213 N.E. 2d, 270. A copy of said opinion is attached hereto as Appendix A.

Jurisdiction

This action was commenced by an indictment returned by the Grand Jury of Williamson County, Illinois, charging that the Appellant "unlawfully, feloniously, wilfully and knowingly offered to sell a certain narcotic drug, to-wit: Cannabis Sativa L. (commonly known as marijuana), to Donald Young for lawful money of the United States of America, otherwise than as authorized in the Uniform Drug Act, of said State of Illinois, then in force and effect, and then unlawfully, feloniously, wilfully and knowingly sold to said Donald Young, a certain non-narcotic substance." The statute upon which the indictment was founded is Section 38 of AN ACT defining and relating to narcotics and other dangerous drugs, to make uniform the law with reference thereto and to repeal certain acts therein named. Approved July 11, 1957. L. 1957, p. 2569 as amended. (Ill.Rev.Stat., 1965, Ch. 38, sec. 22—40) The judgment of the Supreme Court of Illinois was entered on November 19, 1965, and a timely petition for rehearing was denied on January 24, 1966. The notice of appeal was filed in the Supreme Court of Illinois on April 21, 1966. The jurisdiction of the Supreme Court to review this decision is conferred by Title 28, United States Code, Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Lochner* v. *New York,* 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937; *Coppage* v. *Kansas,* 236 U.S. 1, 35 S.Ct. 240, 59 L.Ed. 441; *Adkins* v. *Children's Hospital,* 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed 785; *Jay Burns Baking Co.* v. *Bryan,* 264 U.S. 504, 44 S.Ct. 412, 68 L.Ed. 813.

Question Presented

Whether the statute under which the appellant was convicted which makes criminal the selling of a non-narcotic substance after offering, or arranging, or negotiating to have any narcotic drug sold is an improper exercise of the police power and contrary to the due process clause of the XIVth Amendment to the Constitution of the United States.

Statute Involved

Illinois Revised Statutes, 1965, ch. 38, §22—40:

* * *

Whoever agrees, consents or in any manner offers to unlawfully sell, prescribe, administer, transport, dispense or give any narcotic drugs to any person, or offers, arranges, or negotiates to have any narcotic drugs unlawfully sold, prescribed, administered, transported, dispensed

* * * *

or given, and then sells, prescribes, administers, transports, dispenses or gives, or offers, arranges or negotiates to have sold, delivered, transported, furnished, administered, dispensed or given to any person any non-narcotic liquid, substance or material shall be imprisoned in the penitentiary for any term from 1 year to 10 years.

Statement

The following excerpt from the Supreme Court of Illinois is, we believe, a most adequate statement of the case:

> A jury in the circuit court of Williamson County found defendant, John Calcaterra, guilty of selling a non-narcotic substance under the representation that it was a narcotic, in violation of section 38 of the Uniform Narcotic Drug Act. (Ill. Rev. Stat. 1961, chap. 38, par. 22—40.) He was sentenced to the penitentiary for a term of three to ten years. A constitutional question gives us jurisdiction.

On October 23, 1961, two agents for the Illinois Division of Narcotics Control visited a tavern in Colp, Illinois, with whose operation defendant was associated. The two officers were accompanied by an informer named Prigano, who had a prior acquaintanceship with defendant. The purpose of their visit was to see if narcotics could be purchased at the tavern. It is undisputed that the officers subsequently "made a deal" to purchase a quantity of marijuana for $50, and that they paid such a sum to one James Houston and received from him a sack containing crushed leaves. A subsequent chemical analysis of the leaves disclosed them to be of a non-narcotic species. Indeed, Houston, who was jointly indicted with defendant and entered a plea of guilty, testified that the substance was no more than common milkweed. The conflicts in the evidence center around the question of whether or not defendant was a participant in the fraudulent and unlawful sale.

According to the agent who went into the tavern, he was introduced to defendant by the informer and the three men then sat at a table having drinks. After some perfunctory conversation about stimulant pills and prostitution, the informer indicated that he wanted to buy some narcotics and marijuana. Houston, who was also acquainted with the informer, entered the tavern and joined the others at the table. A discussion concerning the purchase of narcotics was continued. After a short time Houston purportedly had a whispered conversation with defendant and stated: "We've got about a half pound or a pound of marijuana that you can have for $150." A price of $50 was finally agreed upon, after which Houston, the informer and

the two agents drove to Carbondale where Houston entered a house for a short time and returned with a sack containing crushed leaves. They then returned to the parking lot of the tavern in Colp, at which point Houston gave the sack of leaves to the agents and received $50. When they entered the tavern, according to the further testimony of the agent, defendant was standing at the end of the bar and inquired whether the "stuff" was satisfactory, after which Houston and defendant stepped into a back room where the former handed defendant the money he had received.

Defendant denied taking part in any discussion concerning pep pills or narcotics, and stated that after Houston entered he left the table and returned only to serve drinks. This was corroborated by a bartender, a waitress, the tavern handyman, and Houston. Likewise, he denied that he knew why the group left the tavern, or where they were going, or that he had on their return made any inquiry about the "stuff." He did, however, admit that he had received some money from Houston, but denied that it had been in a back room. His explanation was that he had done no more than change a large bill for Houston, a part of which he retained in satisfaction of a prior indebtedness. In this defendant was supported by the bartender who said that she had the only key to the back room and that defendant had not gone there, that Houston had first asked her to change the bill, and that she had sent Houston to defendant for change because the cash register had already been checked out.

The question presented here was considered by the Supreme Court of Illinois in its opinion in this case (App. 3, 4, *infra*) and was decided adversely to the appellant.

The Question Is Substantial

1. The question presented in this case is one of great substantiality because the cases upon which it rests have never been overruled although judges of this Court have regarded them as having been discarded, *Ferguson* v. *Skrupa,* 372 U.S. 726, 83 S.Ct. 1028, 10 L.Ed. 2d, 93; *Griswold* v. *Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, ... L. Ed. 2d. ..... The fact remains that the principles enunciated in *Lochner* v. *New York,* 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937, *Coppage* v. *Kansas,* 236 U.S. 1, 35 S.Ct. 240, 59 L.Ed. 441, *Adkins* v. *Children's Hospital,* 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed 785, and *Jay Burns Baking Co.* v. *Bryan,* 264 U.S. 504, 44 S.Ct. 412, 68 L.Ed. 813, have never been expressly overruled although the change in the social values of the nation has caused the results achieved in them to be discredited.

In the present case, there need be no prejudice against the result which would be achieved if the Illinois Statute in question were to be struck down as violating a due process clause of the XIVth Amendment. The defendant was convicted of a crime which makes illegal an act which has no bearing whatsoever upon the health, welfare, safety and morals of the people of the State of Illinois. In fact, the defendant was convicted of declining to sell to an agent of the State of Illinois, a narcotic substance.

We submit the following quotation from *Lochner* v. *New York,* 198 U.S. 45, 56:

> It must, of course, be conceded that there is a limit to the valid exercise of the police power by the State. There is no dispute concerning this general proposition. Otherwise, the Fourteenth Amendment would have no efficacy and the legislatures of the State would have unbounded power, and it would be enough to say

that any piece of legislation was enacted to conserve the moral, the health or the safety of the People; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be mere pretext—become another and delusive name for the supreme sovereignty of the State to be exercised free from constitutional restraint. This is not contended for. In every case that comes before this Court, therefore, where legislation of this character is concerned, and where the protection of the Federal Constitution is sought, the question necessarily arises: is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family?

We further submit the following language from *Coppage v. Kansas*, 236 U.S. 1, 15:

> Now, it seems to us clear that a statutory provision which is not a legitimate police regulation cannot be made such by being placed in the same act with a police regulation, or by being enacted under a title that declares a purpose which would be a proper object for the exercise of that power. "Its true character cannot be changed by its collocation," as Mr. Justice Grier said in the *Passenger Cases*, 7 How. 283, 458. It is equally clear, we think, that to punish an employer or his agent for simply proposing certain terms of employment, under circumstances devoid of coercion, duress, or undue influence, has no reasonable relation to a declared purpose of repressing coercion, duress, and undue influence. Nor can a state, by designating as "coercion" conduct which is not such in truth, render criminal any normal and essentially innocent exercise of personal liberty or of property rights; for to permit this would deprive the Fourteenth Amendment of its effective force in this regard.

Similarly, in *Jay Burns Baking Co.* v. *Bryan,* 264 U.S. 504, 513, the court had this to say concerning a police regulation of the State of Nebraska:

> Undoubtedly, the police power of the state may be exerted to protect purchasers from imposition by sale of short weight loaves. * * * Many laws have been passed for that purpose. But a state may not, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them. * * * Constitutional protection having been invoked, it is the duty of the court to determine whether the challenge provision has reasonable relation to the protection of purchasers of bread against fraud by short weights and really tends to accomplish the purpose for which it was enacted.

The court in each of these cases has demonstrated its concern over the reasonableness of state legislation which creates police regulation. Although it has become fashionable in recent years to characterize these decisions as having been discredited and the court has declined to follow them, similar results have been achieved by applying other sections of the Constitution. For example, in *Griswold* v. *Connecticut,* 381 U.S. 479, the court struck down a Connecticut statute which prohibited the use of contraceptive devices or the counseling by any person to use a contraceptive device. The court there recognized a constitutional right to privacy arising from the First, Third, Fourth and Fifth Amendments to the Constitution. Having recognized the right, the court was then forced to make the further determination of whether the use of contraceptive devices was within the realm of privacy. Although the court expressly stated that it was not determining the "wisdom, need, and propriety of laws that touch economic

problems, business affairs, or social conditions" it is apparent that a value judgment was made by the court.

So in the cases which we cited above, the court there, too, was making a value judgment and we question whether there is any real difference in making a value judgment under one section of the Constitution concerning a right to privacy and making a value judgment under another section of the Constitution concerning unreasonable police regulations which deprived an individual of his liberty without due process of law.

We submit that the court must resolve this question which in spite of thirty years of legal history remains unresolved.

Respectfully submitted,

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APPENDIX A

Opinion of the Supreme Court of Illinois

MR. JUSTICE HOUSE delivered the opinion of the court:

A jury in the circuit court of Williamson County found defendant, John Calcaterra, guilty of selling a non-narcotic substance under the representation that it was a narcotic, in violation of section 38 of the Uniform Narcotic Drug Act. (Ill. Rev. Stat. 1961, chap. 38, par. 22—40.) He was sentenced to the penitentiary for a term of three to ten years. A constitutional question gives us jurisdiction.

On October 23, 1961, two agents for the Illinois Division of Narcotics Control visited a tavern in Colp, Illinois, with whose operation defendant was associated. The two officers were accompanied by an informer named Prigano, who had a prior acquaintanceship with defendant. The purpose of their visit was to see if narcotics could be purchased at the tavern. It is undisputed that the officers subsequently "made a deal" to purchase a quantity of marijuana for $50, and that they paid such a sum to one James Houston and received from him a sack containing crushed leaves. A subsequent chemical analysis of the leaves disclosed them to be of a non-narcotic species. Indeed, Houston, who was jointly indicted with defendant and entered a plea of guilty, testified that the substance was no more than common milkweed. The conflicts in the evidence center around the question of whether or not defendant was a participant in the fraudulent and unlawful sale.

According to the agent who went into the tavern, he was introduced to defendant by the informer and the three men then sat at a table having drinks. After some perfunctory

conversation about stimulant pills and prostitution, the informer indicated that he wanted to buy some narcotics and marijuana. Houston, who was also acquainted with the informer, entered the tavern and joined the others at the table. A discussion concerning the purchase of narcotics was continued. After a short time Houston purportedly had a whispered conversation with defendant and stated: "We've got about a half pound or a pound of marijuana that you can have for $150." A price of $50 was finally agreed upon, after which Houston, the informer and the two agents drove to Carbondale where Houston entered a house for a short time and returned with a sack containing crushed leaves. They then returned to the parking lot of the tavern in Colp, at which point Houston gave the sack of leaves to the agents and received $50. When they entered the tavern, according to the further testimony of the agent, defendant was standing at the end of the bar and inquired whether the "stuff" was satisfactory, after which Houston and defendant stepped into a back room where the former handed defendant the money he had received.

Defendant denied taking part in any discussion concerning pep pills or narcotics, and stated that after Houston entered he left the table and returned only to serve drinks. This was corroborated by a bartender, a waitress, the tavern handyman, and Houston. Likewise, he denies that he knew why the group left the tavern, or where they were going, or that he had on their return made any inquiry about the "stuff." He did, however, admit that he had received some money from Houston, but denied that it had been in a back room. His explanation was that he had done no more than change a large bill for Houston, a part of which he retained in satisfaction of a prior indebtedness. In this defendant was supported by the bartender who said that she had the only key to the back room and that de-

fendant had not gone there, that Houston had first asked her to change the bill, and that she had sent Houston to defendant for change because the cash register had already been checked out.

The initial contentions of defendant are directed to the constitutional validity of section 38 of the act, which reads in pertinent part: "Whoever agrees, consents or in any manner offers to unlawfully sell, * * * to any person, or offers, arranges, or negotiates to have any narcotic drugs unlawfully sold, * * * and then sells, * * * or negotiates to have sold, * * * any non-narcotic liquid, substance or material shall be imprisoned in the penitentiary for any term from 1 year to 10 years." Defendant argues that the section is an improper exercise of the police power and that it is vague and uncertain, thereby causing him to be deprived of his liberty without due process of law, and that it also violates the requirement of section 13 of article IV of the Illinois constitution that the subject of a legislative bill be expressed in its title.

Although conceding that the police power properly encompasses legislation designed to control and discourage traffic in narcotic drugs, defendant insists that a law making it a criminal offense to sell a non-narcotic substance is in no way related to the public health, safety, welfare or morals and is therefore an invalid exercise of the police power. The legislature might reasonably have assumed that when an individual purports to unlawfully furnish or arrange the sale of narcotic drugs he is participating in the illicit trade whether or not the substance he sells and furnishes is in fact a narcotic. By holding himself out as a source of supply he is encouraging the purchaser to continue his unlawful habit and, in selling a non-narcotic substance, the peddler is realizing funds which in many instances will be used to further actual narcotics traffic.

Furthermore, as was observed in *People* v. *Shepard,* 169 Cal. App. 2d 283, 337 P.2d 214, where a statute comparable to our own was being considered, many vendors of narcotics upon initial contact will, in order to avoid selling to a police officer or informer, actually test the buyer by first selling him a non-narcotic substance. The section here enables enforcement officers to effectively meet this phase of the illegal drug traffic, and to prevent its development into actual sales of drugs. We conclude that the purpose of the section is to discourage illicit traffic in narcotics and is reasonably related to the public safety and welfare.

It is next contended that the section is vague and uncertain because it does not define "a non-narcotic liquid, substance or material." No definition is necessary for words of common and accepted meaning. Moreover, the crime described by the section is not the mere selling of a non-narcotic substance, as defendant's argument assumes, but is the selling of such a substance under the representation that it is a narcotic drug. The meaning of the section is clear and adequately describes the evil to be met and the practices to be avoided. Cf. *Hershey Mfg. Co.* v. *Amadowski,* 22 Ill.2d 36.

Nor is the section violative of section 13 of article IV of our constitution. This court has consistently held that where the title of an act is general, any provision which is germane to the subject may be properly included in the act. (*People* v. *Landers,* 329 Ill. 453; *People* v. *McBride,* 234 Ill. 146; *People ex rel. Kell* v. *Kramer,* 328 Ill. 512.) As previously pointed out, the section is reasonably related to illicit traffic in narcotics, and to the act's purposes of discouraging and punishing those who engage in such traffic.

Defendant's contention that he was not proved guilty beyond a reasonable doubt is, in essence, an argument that the conflicting evidence should have been resolved in his

favor. The solution rests squarely on the credibility of the witnesses, and it is axiomatic that the credibility of witnesses and the weight to be given their testimony is for the jury. (*People* v. *Coulson,* 13 Ill.2d 290; *People* v. *Bazemore,* 25 Ill.2d 74.) The jury could find from the evidence that the agreement to sell was reached only after Houston had a whispered conversation with defendant, and that the latter shared in the proceeds of the sale. It was not obliged to believe the testimony of defense witnesses that defendant had not participated in the conversation, nor their explanations as to why money was exchanged between defendant and Houston. *People* v. *Hanson,* 31 Ill.2d 31.

Some suggestion is also made by defendant that he should be released because he was entrapped into committing the crime. The defense of entrapment, however, is not available to an accused who, like defendant, denied having committed or participated in an unlawful act. *People* v. *Outten,* 13 Ill.2d 21.

There are numerous claims of trial error, some of which are urged as having denied defendant a fair and impartial trial. Defendant asserts that he was prejudiced by two newspaper articles published on the eve of trial, by the trial court's statement to the prospective jurors that "this is a narcotics suit", by improper closing argument on the part of the State's Attorney concerning "dope" traffic and its evils, and by a remark of a rejected juror allegedly made on his *voir dire* examination. We find no error in any of these respects. There was no showing that any of the jurors had read the newspaper articles, (*People* v. *Gambino,* 12 Ill.2d 29; *People* v. *Miller,* 13 Ill.2d 84) the court's remark was justified and substantiated by the indictment upon which defendant was being tried, the argument of the prosecutor was justified by the evidence and was within the bounds of legitimate argument, (*People* v. *Halteman,*

10 Ill.2d 74) and the claim of an improper remark by a juror is *dehors* the record and not properly before us. *People* v. *Owens,* 23 Ill.2d 534.

It is also claimed that it was error to admit the sack of dried leaves into evidence because continuity of possession was not established. The record discloses otherwise. Through identifying marks placed on the bag by the agents who purchased it and the chemist who analyzed its contents, possession was established up to the time of trial. The trial court did not err in permitting the agent to testify concerning portions of his conversation with defendant relating to prostitution and stimulant pills. This testimony was merely part of the continuing conversation in which defendant participated and was so interwoven with the transaction for which he was being tried as to be a part of the *res gestae. People* v. *Marose,* 10 Ill.2d 340; *People* v. *Jarvis,* 306 Ill. 611.

Objection is also made to Peoples instructions Nos. 3 and 8. The former, which merely told the jurors that narcotic drugs included marijuana, was not objected to in the trial court and may not be attacked on appeal. (*People* v. *Rave,* 364 Ill. 72.) By instruction No. 8 the jury was advised that the People had no obligation to call an informer as a witness, and defendant's objections are that it unduly singles out one witness and limits the duty of the People in a narcotics case. The instruction does not single out or give undue emphasis to a witness, and correctly states that the People have no duty to call an informer. *People* v. *Haltemán,* 10 Ill.2d 74; *People* v. *Wright;* 27 Ill.2d 557.

Finally, it is urged that the penalty imposed by the court was unreasonably severe, and that the penalty provided for in the section is not apportioned to the nature of the offense as prescribed by section 11 of article II of the Illinois constitution. Considering the nefarious traffic the Uniform

Narcotic Drug Act is designed to discourage, we cannot say that the penalty limit is so unjust or shocking to the conscience as to cause it to offend the constitution. A sentence within the maximum term fixed by the legislature is not cruel and unusual punishment prohibited by the constitution and will not be disturbed upon review. (*People* v. *Dolgin,* 6 Ill.2d 109; *People* v. *Landers,* 329 Ill. 453.) The sentence here was within the prescribed limits and will not be disturbed.

The judgment of the circuit court of Williamson County is affirmed.

Judgment affirmed.

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(ON APPEAL FROM THE SUPREME COURT OF ILLINOIS)

MOTION TO DISMISS.

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(ON APPEAL FROM THE SUPREME COURT OF ILLINOIS)

MOTION TO DISMISS.

The People of the State of Illinois, appellee herein, by William G. Clark, Attorney General of the State of Illinois, pursuant to Rule 16 1 (b) of the Revised Rules of the Supreme Court of the United States moves to dismiss the appeal on the ground that it does not present a substantial federal question.

ARGUMENT

This appeal raises the sole question of whether the State of Illinois has the power to declare that it is unlawful to agree to sell or give a person a narcotic drug and actually deliver a non-narcotic substance.

The substance of the appellant's argument is that such a law in no way furthers the health, safety, or morals of the people and is, therefore, not justified by the police power of a state. Thus he concludes it is an unjustified interference with personal liberty and unconstitutional under the Due Process Clause of the Fourteenth Amendment.

It is not necessary for purposes of this motion to discuss the limitations imposed by the Fourteenth Amendment on the power of a state to enact criminal laws on a subject over which jurisdiction has not been granted to the Federal Government by the Constitution for it is clear that the law in question is in furtherance of the health, safety, and morals of the people and is, therefore, within the police power of a state.

First, it is clear that to purport to sell one substance, even an illegal one, and deliver a worthless substitute is fraudulent conduct which a state may properly take means to suppress. To prey on the weakness of a narcotic addict by taking his funds whether or not the illegal substance is given in return is anti-social behavior.

Secondly, by holding himself out as a source of supply a person is encouraging the narcotics trade and making it appear more popular than it is, and such conduct may properly be treated criminally.

Finally, a person who sells a non-narcotic substance as a narcotic is in most instances a person who also sells

actual narcotics. Often he tests a new prospective purchaser by this means to insure he is not a police informer. Absent the type of statute here involved, there would be little or no way to apprehend such a seller. See *People* v. *Shepard,* 169 Cal. App. 2d 283, 337 P. 2d 214. The absence of the statute gives such a seller safety if it is a controlled sale and additional funds to carry on his illegal activity if it is not.

The most significant reason why it is legal to prohibit this conduct is that it serves no social purpose. An act which cannot serve a good purpose can only achieve improper ends. It is to be noted that every act declared by this Court to be outside the police power of the state constituted an interference with a proper and legal business or freedom. The conduct here in question has no redeeming social value and can only yield anti-social results.

CONCLUSION.

It is respectfully submitted, therefore, that appellant presents no substantial federal question for the decision of this Court and that this appeal should be dismissed.

Respectfully submitted,

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